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92-1353

No. _____

Supreme Court, U.S.
FILED
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1992

DARRYL LEWIS

PETITIONER

VERSUS

ALVIN CALICE, SOUTH CAROLINA FREIGHT, XYZ INSURANCE COMPANY, SOUTH CENTRAL BELL, AND NEW ORLEANS PUBLIC SERVICE

RESPONDENTS

PETITION FOR WRIT OF CERTIORARI

TO THE COURT OF APPEAL OF LOUISIANA

FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DARRYL LEWIS
8419 PLUM STREET
NEW ORLEANS, LA 70118
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98 PP

QUESTIONS PRESENTED

I. Was the liability assessment of the jury supported by the evidence?

II. Were the damages awarded by the jury supported by the evidence/standard of review?

III. When a case is under appeal, does a Appellate Judge and Defense Attorney have the right to confer on the outcome of a Plaintiff's case before the Court has rendered its decision?

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RESPONDENTS

PETITION FOR A WRIT OF CERTIORARI
TO THE COURT OF APPEAL OF LOUISIANA
FOR THE FOURTH CIRCUIT

MAY IT PLEASE THE COURT:

This application for a Writ of Certiorari is respectfully submitted on behalf of the plaintiff-appellee Darryl N. Lewis, i.e., "the plaintiff". The plaintiff respectfully prays that this court reverses

the judgment and opinion of the United States Court of Appeals for the Fourth Circuit and grant the plaintiff the original judgement rendered by the jury.

JURISDICTION

Jurisdiction is based upon Article V, Section 5(A) of the Louisiana Constitution of 1974. The issues in this case are purely legal and of great significance and consequence: As questions 1 and 2 respectfully state:

(1) Was the liability assessment by the jury supported by the evidence?

(2) Were the damages awarded by the jury supported by the evidence?

It is a well established principle of law in Louisiana that if a witness' testimony has not been contradicted that said testimony must be accepted as true. In addition, Louisiana courts have held firm to the principle that in reviewing the issue of damages on appeal the issue is whether the award can be supported under the interpretation of the evidence most favorable to the plaintiff which

reasonably could have been made by the trier of fact.

The Fourth Circuit Court of Appeal reversed a Jury verdict which favored the plaintiff who was injured while exiting from a vehicle. The Supreme Court upheld this lower court's judgement. Therefore, the plaintiff seeks to have the Federal Supreme Court reinstate the original judgement reached by the trial jury.

The Courts holding is contrary to Louisiana precedent and blatant misinterpretation of the "manifest error" doctrine. The Fourth Circuit Court of appeal cited the authority of Rosell v. Esco, 549 So. 2d 840 (La. 1989) to reverse the jury verdict. The Courts misapplied the "manifest error" doctrine.

The Appellate Court totally disregarded the findings of the jury. The jurors at the trial level credited the testimony of plaintiff's facts and expert witnesses. Yet, the Fourth Circuit Court of Appeal substituted its own views and reversed the Jury award by misapplying the Rosell standard and the Fourth Circuit State Supreme Court upheld this erroneous judgement. The reversal of the trial

court's verdict and later judgement being upheld by higher courts in this case could lead to an erroneous trend in appellate and supreme jurisprudence.

As will be indicated in the "Narrative of Extraordinary Circumstances", the applicant, Darryl Lewis and a witness over heard a conversation between an Appellate Court Judge and the Defendant's attorney in which the Judge had reached a decision and informed the Defendant's attorney before the Appellate Court had rendered its decision. In a similar vein, the petitioner informed his attorney and no action was taken on this matter. Thus, the petitioner believes that his rights have been violated and a miscarriage of justice has taken place.

For the above reasons, the applicant, Darryl Lewis respectfully petitions this Court to issue a Writ of Certiorari.

COURSE OF PRECEEDINGS BELOW

On March 6th, 1985, a suit was brought in the Civil District Court for the Parish of Orleans by

appellee, Darryl Lewis, against appellants, Carolina Freight Carriers Corporation and South Central Bell. At the time of filing suit, plaintiff was represented by Attorney Cardell A. Thomas. This suit alleges that the sole and proximate cause of the December 10th, 1984 accent was the joint and concurrent negligence of Alvin Calice, South Carolina Freight, South Central Bell and New Orleans Public Service. This suit, bearing Civil Action No. 85-3807, was regularly allotted to Judge Robert Katz, presiding over Division "B". On April 15, 1991, defendant, New Orleans Public Service, was dismissed from this lawsuit. On April 15, 1991, defendant, Alvin Calice, driver of the Carolina Freight Carriers Corporation's truck was dismissed from the lawsuit. At the date of trial defendant, Alvin Calice, was deceased. A trial was conducted before a Jury which commenced on April 15, 1991 ended on April 18, 1991 with an award to the plaintiff-appellee, Darryl Lewis, as follows:

General Damages	$	37,500.00
Past Medical Expenses		5,300.00
Future Medical Expenses		6,000.00

Past Lost Wages	62,000.00
Future Lost Wages (Diminished earning capacity	5,000.00
TOTAL	$ 135,800.00

Defendants-appellants, Carolina Freight Carriers Corporation and South Central Bell, both filed suspensive appeals to this Honorable Court.

STATEMENT OF THE CASE

On December 10, 1984 in the 1700 block of Burdette Street near the intersection of Hickory Street, New Orleans, Louisiana, the plaintiff-appelle, DARRYL LEWIS, had begun to remove parts from Florence White's vehicle so that he could put a distributor on the vehicle and adjust the valves. (Record, Vol. VI, p. 57). After plaintiff reached into the back of the vehicle to get a distributor and a half-inch wrench he exited the vehicle at which time the telephone pole struck him. (Record, Vol. VI., p. 59). The telephone pole in question fell after defendant-appellant's truck, CAROLINA FREIGHT

CARRIERS CORPORATION, pulled down the wires which were holding up the pole.

Plaintiff's independent witness, CAROLYN LYONS, testified that she was in her window taking down curtains when she heard a truck coming down Hickory Street and the truck hit the wire. (Record, Vol. V. p. 6).

Ms. Carolyn Lyons further testified that the accident happened right in front of the 1730 Burdette Street. (Record, Vol V, P. 6.) At the time of the accident, Ms. Lyons resided at 1736 Burdette Street. (Record, Vol V, p. 5.)

She testified that the truck was coming down Hickory Street and the truck was speeding and it hit the wires and the wires pulled the telephone pole as Darryl. And Darryl was getting out of the back of the passenger side of the car and it hit, you know--I didn't see it hit him, but I saw it hit the car. And, when I came outside, when I outside when I got out the window and came to the door, that's when I saw him laying on the ground. (Record, Vol. V. pp. 6-7.)

The independent witness, ERIC HARRIS, testified that the defendant's CAROLINA FREIGHT CARRIERS CORPORATION, truck hit the telephone wires which caused the pole to fall onto the plaintiff-appellee, DARRYL LEWIS. Mr. Eric Harris further testified that the pole hit the car then bounced off the car and hit him (plaintiff). (Record, Vol. IV, pp. 12-13 and p. 16.).

The parties herein stipulated that the wires and pole in question were owned by Appellant-Defendant, SOUTH CENTRAL BELL, and it was further stipulated among the parties that Appellant-Defendant, SOUTH CENTRAL BELL, had custody and control over the equipment which was a pole and wire. (Record, Vol. pp. 3-4.).

Defendant-Appellant, CAROLINA FREIGHT CARRIERS CORPORATION, in its Answer and Cross Claim admitted that it owned the truck which struck the wires and caused the pole to fall.

It is undisputed that DARRYL LEWIS, appellee, received emergency treatment at Oschner Emergency Room after the accident.

The plaintiff returned home from the

Emergency room wearing a cervical collar. (Record, Vol VI, p. 61).

As a result, the plaintiff-appellant, DARRYL LEWIS, received medical treatment from several physicians. He initially sought treatment from Dr. Allain Cracco, who discharged him in April, 1985. However, plaintiff-appellee testified that the treatment rendered by Dr. Cracco did not improve his condition. (Record, Vol. VI, p. 73).

In May, 1985 plaintiff-appellee sought the medical advice of Dr. Joseph Rauchwerk, an orthopedic surgeon. At the initial visit of May 16th, 1985 plaintiff-appellee gave Dr. Rauchwerk a history of a pole falling on his back and hitting hm on the head at which time he fell to the street curb. (Record, Vol. VII, p. 6). Plaintiff-Appellee, DARRYL LEWIS, complained to Dr. Rauchwerk of back, neck and shoulder pain on the left side. (Record, Vol. VII, p. 6). Despite the fact that plaintiff was treated by Dr. Rauchwerk through September 16, 1985, Dr. Rauchwerk testified that he examined plaintiff-appellee only on one occasion, specifically May 16, 1985. (Record, Vol. II, p. 16).

After being dissatisfied with Dr. Rauchwerk, plaintiff-appellee sought medical treatment from Dr. Stuart Phillips, an orthopedic surgeon. Plaintiff commenced treatment with Dr. Stuart Phillips from April, 1986 through the date of trial. (Record, Vol. VI, pp. 78, 153).

The history revealed to Dr. Phillips by plaintiff-appellee was that he was fixing his car. It was an eighteen-wheeler coming down the highway. It pulled a telephone wire and caused the pole to break in half. The pole fell across him. He lost consciousness and woke up at Ochsner. (Record, Vol. VI, pp. 154).

Dr. Phillips testified that as far as his (plaintiff-appellee) examination and his symptoms, they went together pretty well. He had muscle spasms in this neck and he had pain. And, he didn't seem like he was grossly exaggerating his symptoms. (Record, Vol. VI. pp. 155-156).

Plaintiff's treating physician, Dr. Stuart Phillips, diagnosed plaintiff's injuries as a cervical degenerative joint disease or cervical herniated nucleus pulposus. (Record, Vol. VI. pp. 188-189).

As a result of an automobile accident on December 4th, 1984, six days preceding the accident in question, MR. LEWIS was out on sick leave from his employer, Coca Cola Bottling Company, at the time of the accident in question.

Although plaintiff-appellee did not work at all from the date of the first accident he continued to communicate with his employer regarding his medical condition and the fact that he would return to work within a few days. (Record, Vol. VI. p. 52). Unfortunately, the accident in question occurred and as a result Mr. Lewis was unable to return to work.

Other than attempting to work several months in 1986, MR. LEWIS, has been unable to work as a result of the cervical injury, i.e., cervical herniated nucleus pulposus, of December 10th, 1984.

Dr. Melville Wolfson, an economist, testified regarding plaintiff-appellee's economic impairment. Dr. Wolfson testified that the plaintiff-appellee's lost wages from December 10th, 1984 to date, i.e., April 17th, 1991 is ninety-three thousand nine

hundred thirty-eight (93,938.00). (Record, Vol. VI, p. 42). He further testified that if plaintiff-appellee, DARRYL LEWIS, could not go back to work at all, his total loss would be about four hundred seventy-five thousand (475,000.00). And, if he could go back to work and make at least minimum wage equivalent, his loss would be about two hundred ninety-five thousand (295,000.00). (Record, Vol. VII, p. 41).

Darryl Lewis filed a lawsuit against Alvin Calice, the driver of Carolina Freight Carrier Corporation's truck, Carolina Freight Carrier Corporation (erroneously designated as South Carolina Freight), South Central Bell and New Orleans Public Service. See Appendix A hereto. Plaintiff alleged negligence on all parties.

Defendant, New Orleans Public Service, was dismissed from the lawsuit on the first day of trial. See Appendix B hereto. Defendant, South Central Bell, stipulated to the ownership of the pole and wires in question.

The case was tried before a jury on April 15, 16, 17 and 18th, 1991. After listening to all of the

evidence presented by the plaintiff, DARRYL LEWIS, and failing to hear ANY evidence from South Central Bell to call a single fact witness and Carolina Freight Carriers Corporation calling on one fact witness, an emergency medical attendant, Henry Holmes, who appeared at the scene AFTER the accident happened, the jury found in plaintiff's favor on negligence grounds and awarded general damages in the sum of 37,500.00, past medical expenses in the sum of 5,300.00, future medical expenses in the sum of 6,000.00, past lost wages in the sum of 62,000.00 and future lost wages in the sum of 25,000.00. See Appendix C hereto. The defendants filed motions for a new trial and judgment notwithstanding the verdict and both motions were heard and denied.

Both defendants, South Central Bell and Carolina Freight Carriers Corporation, appealed. Oral argument was heard on May 8th, 1992. On May 14th, 1992 the Fourth Circuit Court of Appeal signed an Order stating that two of the judges sitting in this case would reverse the judgment of the district court. The third judge would affirm.

Appendix D hereto. Accordingly, the case was reargued before a panel of five judges on May 28th, 1992. The Fourth Circuit Court of Appeal Reversed. See Appendix E hereto.

Appellee-plaintiff, DARRYL LEWIS, filed a request for a rehearing. See Appendix F hereto. It was denied. See G hereto.

The Courts below totally disregarded the fact that the jurors heard the testimony of plaintiff and his witnesses along with all treating physicians, including physicians who treated plaintiff for a preceding accident on December 4th, 1984 and subsequent accidents after the accident in question, December 10th, 1984. The jurors were in a distinct and unique position to weigh the credibility, reliability and character of the witnesses. At no time during the trial did plaintiff deny the fact that he was a victim of subsequent and/or preceding accident. The jurors were in court to "judge" the credibility of the plaintiff. The Courts below found that the plaintiff has failed to prove causation between his injury and defendants' actions. Further, the Courts below held that plaintiff

deceived his physicians and parties during the course of litigation. The Fourth Circuit Court of Appeal's decision was fallacious and without merit and the jury was manifestly correct in its verdict. And yet, the Louisiana State Supreme Court upheld the lower court's decision which too indicates the erroneous mind-set of the presiding judiciaries.

REASONS FOR GRANTING THE WRIT

According to the Rules Of The Supreme Court,(U.S. Printing Office, 1991,) "A petition for a writ of certiorari will be granted only when there are special and important reasons therefor"(p.6). This petition presents an issue resolved by implication by this Court but not specifically and unequivocally decided by this court; and the Opinion below conflicts, by implication, with previous decisions of this Court and with the decision of another Circuit.

Therefore, in contravention of controlling precedent both from this court and other Louisiana courts the Fourth Circuit Court of Appeal Adopted

and the Supreme Court applied an erroneous rule of law by reversing a trial court's finding of fact in the absence of manifested error and disregarded the deference given by the jury verdict.

It is well settled that a court of appeal may not set aside a trial court's or jury's finding of fact in the absence of "manifested error" or unless it is "clearly wrong", and where there is conflict in the testimony, reasonable inferences of fact should not be disturbed upon review, even though the appellate court may feel that its own evaluations and inferences are as reasonable. Arceneaux v. Domingue, 365 So. 2d 1330, 1333 (La. 1978); Canter v. Koehring, 283 So. 2d 716, 724 (La. 1973). The Louisiana courts have continuously held that when findings are based on determinations regarding the credibility of witnesses, the manifest error - clearly wrong standard demands great deference to the trier of fact's findings; for only the factfinder can be aware of the variations in demeanor and tone of voice that bear so heavily on the listener's understanding and belief in what is said. Canter v. Koehring, supra at 724; Virgil v. American

Guarantee & Liability Insurance Company, 507 So. 2d 825, 826 (La. 1987); Boulos v. Morrison, 503 So. 2d 1, 3 (La. 1987); Williams v. Keystone General Contractors, Inc., 488 So. 2d 999, 1001, (La. 1986); Johnson v. Insurance Company of North America, 454 So. 2d 1113, 1117 (La. 1984); Berry v. Livingston Roofing Co., 403 So. 2d 1247, 1249 (La. 1981); Crump v. Hartford Accident & Indemnity Co., 357 So. 2d 300, 301 (La. 1979); Rosell v. Esco, (La Supr. Ct., 840, 844).

In the case of Scamardo, et al v. New Orleans Stevedoring Company, 595 So. 2d 1242 (La. App. 4Cir., 1992). the Court below held that "In order for the appellate court to disturb a damage, the record must clearly reveal that the trier of fact abused its discretion in making its award ISA-C.C. art. 2324.1; Coco v. Winston Industries, 341 So. 2d 332 (La. 1976). Only after a determination of abuse has been reached is a resort to prior awards appropriate under Coco for purposes of then determining what would be an appropriate award in the present case. Reck v. Stevens, 373 So. 2d 498 (La. 1979); Anderson v. New Orleans Public Service,

Inc., 583 So. 2d 829 (La. 1991). The reviewing court must evaluate the particular injuries and their effects on the particular injured persons. Reck, supra. The tort-fessor takes the victim as he finds him. Cazenave v. Pierce, 568 So. 2d 1360 (La. App. 4th Cir., 1990); Arruebarrena v. Boh Bros. Const. Co., 539 so. 2d 78 (La. App 4th Cir., 1989).

In the instant case there was no conflicting testimony about the cause of the accident, nor the owner of the truck or the wires and pole. but if we conclude that there are conflicts in the testimony about certain factual matters, the resolution of which depends on a determination of the credibility of the witnesses, this is a matter of the weight of the evidence not of sufficiency. Tibbs v. Florida, 457 U.S. 31, 102 S.Ct. 2211, 72 L. Ed 2nd 652 (1982).

Dr. Melville Z. Wolfson, an economist, testified in the instant case on behalf of the plaintiff. His testimony was uncontradicted. Defendants did not produce at trial any economist to testify. The testimony of a witnesses which has not been controverted or contradicted, as in this case, must

be accepted as true. See Olds v. Ashley, 250 (La. 935, 200 So. 1(1967), wherein the above rule was set down by the Honorable Supreme Court of the State of Louisiana.

On the issue of damages, the appellate review of quantum awards is strictly limited to raising inadequate awards to the lowest level and to lowering excessive awards to the highest level that is reasonable within the vast discretion of the trier of fact. Reck v. Stevens, 373 So. 3d 498, 500 (La 1979; Coco v. Winston Industries, Inc., (supra); Alexander v. Leger, 423 So. 2d 731, 733 (La. App. 3rd Cir., 1982).

The basic test in reviewing the issue of quantum on appeal is whether the award can be supported under the interpretation of the evidence most favorable to plaintiffs which reasonably could have been made by the trier of fact. Schexwayder v. Carpenter, 346 So. 2d 196, 198 (La. 1977).

Further as stated in Rosell v. Esco, 549 So. 2d 840, 844-45 (La. 1989), the court held "however, if two permissible views of the evidence are presented, the factfinder's choice between them

cannot be manifestly erroneous" Curry v. Johnson, (La., App. 1st Cir., 1991, CA 90-1053).

In the instant case the Fourth Circuit Court of Appeal and the Louisiana State Supreme Court obviously cited in the opinion gave serious credibility to the defendant-appellant's expert witness, Dr. Monroe Laborde. The Court in Landry v. Melancon held "although defendant's expert witness testified that he did not think a second surgery was necessary, the jury was entitled to give greater weight to the treating physicians testimony concerning future medical treatments" (558 So 2d 1143 (La. App. 1st. Cir., 1989).

Dr. Laborde testified that the was paid 350.00 by appellant, Carolina Freight Carriers Corporation to perform an independent medical examination on the plaintiff, Darryl Lewis. However, Dr. Laborde stated that he did only one physical (Record, Vol. VII, p. 191).

On April 18th, 1992, the trial Jury rendered its decision in favor of the plaintiff, Darryl Lewis. As the plaintiff and his attorney, Gail M. Nelson were walking out of the court room, the Defense Attorney, Nancy Marshall turned to the plaintiff's attorney and stated: "He will never see that award money". At which time, Mr. Lewis looked at his attorney in a state of awe! They left the court room and his attorney told him: "Don't worry about what she has said".

However, on May 2, 1992, approximately two weeks after the trial Jury's decision was reached in favor of the plaintiff, Darryl N. Lewis, he and a companion, Dollinder Smith were in Audubon Park performing their stretch exercises before they began their walk through the park. While at the the pull-up bars, Judge Schotts (of the Appellate Court) and Attorney Nancy Marshall (Defendant's Attorney) were walking by. Mr. Lewis and Dollinder Smith saw Judge Schotts and Attorney Marshall before they recognized the plaintiff.

Dollinder Smith and the plaintiff over heard a statement made by Nancy Marshall to Judge Schotts. Attorney Marshall stated: ". . .Darryl Lewis would never see the award money". At which time the plaintiff, looked at his work-out partner and said: "They are discussing my case, that's me they are talking about!" Upon hearing this statement, the plaintiff, turned around and was immediately recognized by the Defense Attorney, Nancy Marshall --- Attorney Marshall then exclaimed: "Look, it's Darryl!!". She and the Judge were shocked judging from the look on their faces. After seeing Mr. Lewis, Judge Schotts and Attorney Marshall scurried from the park.

The plaintiff and his companion, Dollinder Smith, have signed affidavits to support the above account. Appendix H hereto.

Dr. Rauchwerk testified that the patient was examined only once, however medical records reflect a different story (Appendix I-1, hereto) and Dr. Raucherk signed an insurance disability statement issued by Union National Life Insurance (Appendix I-2, hereto).

In lieu of the above circumstances, the plaintiff, Darryl Lewis is requesting that the Honorable Judges of the Federal Supreme Court weigh this matter and prays that the judgement is found in his favor. Mr. Lewis is the father of four children and is currently receiving Social Security (Appendix J) because he is disabled. Mr Lewis has never filed for disability benefits prior to the December 10th, 1984 accident. As reflected in the decision (Appendix I-2), Mr. Lewis' disability was found to be related to the December 10th, 1984 accident.

CONCLUSION

The defendants-appellants challenge as excessive the award of the jury trial.

Quantum may be disturbed on appellate review only if an evidentiary record shows that the Trial Court clearly abused its broad discretion. Reck v. Stevens, 375 So. 2d, 498, 1501 (La. 1979). If the award can be supported under the interpretation of the evidence most favorable to the plaintiff which reasonably could have been made by the trier of fact (in this case the jury) then the award must

stand. Schexnayder v. Carpenter, 346 So. 2d, 196, 198 (La. 1977).

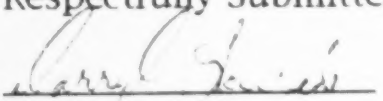
The medical and lay testimony provides ample evidence to support the jury's award. Additionally, the Department of Health and Human Services judgement of the plaintiff's disability further substantiates the plaintiff's medical condition and justifies the award..

The arguments of the appellate provide no basis whatsoever to conclude that the jury and/or trial court abused its vast discretion. There was no error committed by the Jury in believing that the plaintiff-appellee was injured in the telephone pole accident and that his present complaints are causally related to that accident. The plaintiff, Darryl N. Lewis was entitled to an award for lost wages. The Jury correctly found on the evidence produced, that the plaintiff-appellee was entitled to an award for future earning capacity. The trial Court correctly found, on the evidence produced, that the plaintiff-appellee was entitled to medical expenses.

According to Judge Charles Jones, who respectifully chose to dissent,"The jury was not manifestly erroneous in its determination of liability and awarded the plaintiff. . . .the question of injury caused by the accident . . . is the subject of this suit. . . . the jury decided in favor of the plaintiff. . . . The jury, . . . heard the testimony of all. . . The jury concluded that the plaintiff suffered injuries in this accident and that he was entitled to damages. This court has effectively overruled the jury and submitted its own factual determination for that of the jury". See Appendix E hereto.

His dissent indicates that he was aware of the law and that he had the judicial insight to realize the ramifications of the courts decision. Therefore, plaintiff asks that all extraordinary circumstances be weighed and respectifully requests that the modest award of the jury to the plaintiff-appellee, Darryl N. Lewis, be affirmed.

Respectfully Submitted,



Darryl N. Lewis

Appendix A

CIVIL DISTRICT COURT

FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 85-380 DIVISION "B" DOCKET NO

DARRYL LEWIS & FLORENCE WHITE

VERSUS

ALVIN CALICE, SOUTH CAROLINA FREIGHT, XYZ INSURANCE COMPANY, SOUTH CENTRAL BELL AND NEW ORLEANS PUBLIC SERVICE

FILED:_____ _____

DEPUTY CLERK

PETITION FOR DAMAGES

The petition of Darryl Lewis and Florence White all persons of full age and domiciled in the Parish of Orleans, State of Louisiana, with respect represents:

I.

The following parties, made defendants herewith, are indebted unto plaintiffs individually and in solido for the sum of ONE MILLION FIFTY THOUSAND AND NO/100 ($1,050,000.00) DOLLARS with legal interest thereon from date of judicial demand until paid.

a) Alvin Calice a person of full age and domiciled in the Parish of Orleans and;

b) South Carolina Freight, Inc., a corporation authorized to do and doing business in the State of Louisiana which has appointed the Secretary of State of Louisiana as its agent for Service of Process, and hence is considered as domiciled in this Parish for purpose of suit in Louisiana;

c) XYZ Insurance Company, an insurance corporation authorized to do and doing business in the State of Louisiana which has appointed the Secretary of State of Louisiana as its agent for Service of Process, and hence is considered as domiciled in this Parish for purposes of suit in Louisiana, and at all material times herewith the liability insurance currier of defendant South Carolina Freight;

d) South Central Bell, a corporation authorized to do and doing business in the State of Louisiana which has appointed the Secretary of State of Louisiana as its' agent for Service of Process, and hence is considered as domiciled in this Parish for purposes of suit in Louisiana, and;

e) New Orleans Public Service a corporation authorized to do and doing business in the State of Louisiana which has appointed the Secretary of State of Louisiana as its' agent for Service of Process, and hence is considered as domiciled in this Parish for purposes of suit in Louisiana.

II.

On or about 1:00 p.m. on December 10, 1984 at Hickory and Burdette Streets petitioner Darryl Lewis was making repairs on petitioner Florence White's vehicle, when suddenly a South Carolina Freight Truck traveled down Hickory Street causing low hanging wires to catch onto said truck, thereby causing a post near the vehicle in which Mr. Lewis was working, to fall on him, knock him out of the vehicle causing him to sustain sever bodily harm. Petitioner Florence White sustained severe damage to her vehicle as a result to the post falling on her vehicle.

III.

The sole and proximate cause of the accident herewith was the gross and wanton negligence of Alvin Calice, South Carolina Freight, South Central Bell and New Orleans Public Service which consists

of, but not necessary limited to, the following particulars, to wit:

a) Failing to keep his vehicle under control;

b) Failing to keep a proper outlook;

c) Driving in a careless and reckless manner;

d) Failing to act as a reasonable and prudent person;

e) Failing to see what he should have and/or heed what he did see; and

f) Allowing telephone and electrical wires to become in a state of disrepair so as to suspend dangerously on the street where the accident occurred.

g) Such other acts or omission and/or commission as constitute negligence and which may be proved upon trial of this matter.

IV.

XYZ Insurance Company issued to South Carolina Freight a policy of liability insurance which protected them against the negligent operation of their vehicle and the aforementioned insurance was in force and affords recovery for this claim.

V.

Aforesaid accident caused petitioner Darryl Lewis to sustain injuries to his bones, muscles, joints, tissues, and ligaments of his head, neck, vertebrae, back, hips, legs, ankles, and feet.

VI.

The injuries which petitioner Darryl Lewis sustained as a result of the forementioned collision caused him excruciating and severe pain, discomfort, disability and suffering, both physical and mental: All requiring extensive medical care and treatment.

VII.

Petitioner Darryl Lewis sustained the following itemized damages as result of this accident:

Medical Expenses:	
Past present and future	$ 250,000.00
Pain & Suffering:	
Past present and future	$ 500,000.00
Mental Anguish:	
Past present and future	$ 250,000.00
Total	$ 1,000,000.00

VIII.

Petitioner Florence White sustained the following damages as a result of this accident:

Damages to Vehicle	$ 25,000.00
Mental Anguish:	
Past present and future	$ 25,000.00
Total	$ 50,000.00

IX.

Petitioners allege amicable demand without avail.

WHEREFORE, petitioners prays that after due proceedings, there be judgement herewith in favor of plaintiffs Darryl Lewis and Florence White, and against the defendants, Alvin Calice, South Carolina Freight, XYZ Insurance Company, South Central Bell, and New Orleans Public Service individually as in solido, for the sum of ONE MILLION FIFTY THOUSAND AND NO/100 Dollars together with legal interest thereon from date of judicial demand until paid and for all general and equitable relief.

Respectfully submitted,

_____

CARDELL A THOMAS

Attorney for Plaintiff

PLEASE SERVE:

Alvin Calice and his Employer, South Carolina Freight (through the Secretary of State for the State of Louisiana)

XYZ Insurance Company

(Hold Service)

South Central Bell (through the Secretary of State the of Louisiana)

New Orleans Public Service (through the Secretary of State the of Louisiana)

Appendix B

CIVIL DISTRICT COURT

FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 00-03007 DIVISION " B" DOCKET NO. 4

DARRYL LEWIS, ET AL

VERSUS

ALVIN CALICE, ET AL

FILED:_____ _____

DEPUTY CLERK

JUDGMENT

This matter came for hearing before this Court, on the 15th day of April, 1991, on defendant's Motion for Involuntary Dismissal

Present: William H. Boustead, attorney for New Orleans Public Service Inc.;
Gail Nelson, attorney for plaintiff
Nancy Marshall, attorney for Carolina Freight Carriers
Lawrence Centola, attorney for South Central Bell

When after hearing the argument of Counsel and the stipulations submitted, considering the law and evidence to be in favor of the defendant, NOPSI.

IT IS ORDERED, ADJUDGED AND DECREED that defendant, NOPSI's motion for involuntary dismissal is hereby granted and plaintiff's lawsuit against defendant, NOPSI, only, and reserving all other rights against all other parties is hereby dismissed.

JUDGMENT, READ, RENDERED AND SIGNED IN OPEN COURT, this 16th day of April, 1991, at New Orleans, Louisiana.

_____

Robert A Katz

Judge

Received April 18 1991

Entered on Minutes

Appendix C

CIVIL DISTRICT COURT

FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

NUMBER: 85-3807 DIVISION " B" DOCKET NO. 4

DARRYL LEWIS AND FLORENCE WHITE

VS

CAROLINA FREIGHT CARRIERS CORP. AND SOUTH CENTRAL BELL

JUDGMENT

This matter came on for trial by jury on April 15, 16, 17 and 18, 1991.

Present: Gail Nelson, Esq., attorney for and Darryl Lewis;

Larry Centola, Esq., attorney for South Central Bell;

Nancy Marshall, Esq., attorney for Carolina Freight, Inc.

and the following jurors:

Valinder Addison	Wanda Bailey
Ethen A. Crawford	Stephen S. Decker
Hilda Williams	Lovie Encalade
Dolores Evans	Brenda Nunnery
Maude Parker	Patricia Scott
Pamela Smith	Marigold Taylor

After considering the pleadings, the evidence, the argument of counsel, and the law and in compliance with the jury verdicts;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein favor of Darryl Lewis and against Carolina Freight Carriers Corp. and South Central Bell in solido to the extent of 25% against Carolina Freight Carriers Corp. and 75% against South Central Bell as follows: general damages in the sum of $37,500.00; past medical expenses in the sum of $5,300.00; future medical expenses in the sum of $6,00.00; past lost wages in the sum of $62,000.00; and future lost wages in the sum of $25,000.00 all with interest from the date of judicial demand until paid and for all costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the defendants be cast for the expert witness fees as follows: Dr. Stuart Phillips, in the sum of $500.00; Dr. Rauchwerk in the sum of $200.00; and Dr. Wolfson in the sum of $300.00.

New Orleans, Louisiana , this 22nd day of April, 1991.

_____

Robert A Katz, Judge

Appendix D

DARRYL LEWIS AND	*	No. 91-CA-2145
FLORENCE WHITE	*	COURT OF APPEAL
VERSUS	*	FOURTH CIRCUIT
ALVIN CALICE, SOUTH CAROLINA FREIGHT, XYZ INSURANCE COMPANY, SOUTH CENTRAL BELL, AND NEW ORLEANS PUBLIC SERVICE		STATE OF LOUISIANA

* * * * * *

ORDER

Two of the judges sitting in this case would reverse the judgment of the district court. The third judge would affirm.

Accordingly, pursuant to Louisiana Constitution, Art. 5 Section 8(B) the case shall be reargued before a panel of five judges at 1:00 p.m., the 28th of May, 1991. Additional briefs may be submitted on or before the 21st of May, 1992.

New Orleans Louisiana this 14th day of May, 1992.

Chief Judge Patrick M. Schott

Judge Charles R. Jones

Judge Moon Landrieu

Appendix E

DARRYL LEWIS AND	*	No. 91-CA-2145
FLORENCE WHITE	*	COURT OF APPEAL
VERSUS	*	FOURTH CIRCUIT
ALVIN CALICE, SOUTH		STATE OF LOUISIANA
CAROLINA FREIGHT,		
XYZ INSURANCE COMPANY,		
SOUTH CENTRAL BELL, AND NEW		
ORLEANS PUBLIC SERVICE		

* * * * * *

APPEAL FROM CIVIL DISTRICT COURT,

FOR THE PARISH OF ORLEANS

NO. 85-3807, DIVISION "B"

HONORABLE ROBERT A. KATZ, JUDGE

* * * * * *

MOON LANDRIEU

JUDGE

* * * * * *

(Court composed of Chief Judge Patrick M. Schott, Judge Charles R. Ward, Judge Charles R. Jones, Judge Miriam G. Waltzer and Judge Moon Landrieu)

Jones, J., dissents.

GAIL M. NELSON

NEW ORLEANS, LOUISIANA

Attorney for Plaintiff/Appellee

NANCY J. MARSHALL

DEUTSCH, KERRIGAN & STILES

NEW ORLEANS, LOUISIANA

Attorney for Defendant/Appellant

Carolina Freight Carriers Corp.

LAWRENCE J. CENTOLA, JR.

ROBERT J. BURNS, JR.

HOFFMAN, SUTTERFIELD, ENSENAT & BANKSTON

NEW ORLEANS, LOUISIANA

Attorney for Defendant/Appellant

South Central Bell

COURT OF APPEAL, FOURTH CIRCUIT

FILED

JUN 30 1992

DANIELLE SCHOTT

CLERK OF COURT

REVERSED

91CA2145.OPI

This appeal arises from an award for alleged personal injuries sustained in an accident.

On December 10, 1984 on Burdette Street in New Orleans, Louisiana, Darryl Lewis was repairing his mother's automobile when a Carolina Freight truck being driven by Alvin Calice caught a low hanging South Central Bell wire, causing the pole to which the wire was attached to fall. It is undisputed that the pole hit the automobile upon which Lewis was working.

Lewis filed suit against Calice, South Central Bell, South Carolina Freight, XYZ Insurance Company, and New Orleans Public Service for injuries allegedly sustained as a result of the accident. The case was tried by a jury which awarded plaintiff general damages in the amount of $37,000.00, past medicals of $5,000.00, future medicals of $6,000.00, past lost wages $62,000.00 and future lost wages of $25,000.00. Liability was allocated 25% Carolina Freight and 75% to South Central Bell. Carolina Freight and South Central Bell have appealed.

Immediately following the accident, plaintiff was met by paramedic Henry Holmes at the scene

of the accident. Holmes testified that he found plaintiff lying on his back on the ground, conscious and alert, complaining of back pain. Plaintiff told the paramedic that the pole hit the car while he was inside of it, but did not actually hit him. Holmes found no obvious sign of trauma. The plaintiff was transported to Ochsner Hospital. No objective signs of injury were found.

The plaintiff told Ochsner physicians that he struck his forehead on the steering wheel after the car he was in was hit by a falling telephone pole. He stated that he was thrown forward and backward and, as a result, was thrown out of the car, hitting his right shoulder, back and hand. He told the doctors that he had no prior neck or head injuries. By the time of trial, plaintiff's account of the accident had changed to allege that the pole first hit the car, then his head and left shoulder knocking him unconscious until he awoke at the hospital in a dazed state. Plaintiff's medical history is as follows.

In December of 1983, plaintiff was admitted to Ochsner Hospital for back problems and pain i the left side of his neck. The record is silent as to

the origin of the pain.

On December 4, 1984, just six days before the accident at issue, he was involved in an automobile accident. Two days after that accident, he sought treatment from Dr. Landry, an orthopedic surgeon, complaining of neck, shoulder and wrist pain. Landry diagnosed a strained neck and shoulder. The plaintiff again saw Landry on the 13th of December. He told the doctor that the had gone to Ochsner on the 10th because his shoulder injury from the 4th was bothering him. He had his x-rays from the 10th sent to Landry. He never mentioned the accident with the pole. Landry stated that the plaintiff's complaints were difficult to interpret because they could not be correlated with any part of his anatomy. There were no objective findings of injury.

Plaintiff was examined by Dr. Konlee on December 19,1984 for the pole accident. Konlee found no signs of spasm or any other objective sign of injury.

In January of 1985, while he was seeing Landry for the automobile accident of December 4th, plaintiff sought treatment from Dr. Cracco, also

an orthopedic surgeon. Plaintiff complained to Cracco of low back and neck pain due to an accident where a pole fell on his back. The doctor found no spasm, no neurological or physical abnormality and no atrophy or muscle weakness. The diagnosis was a mild cervical and lumbar strain based on subjective complaints. Cracco found that the plaintiff could resume work in three weeks. He saw the plaintiff again in April and found him to be normal.

Unbeknownst to his physicians plaintiff had resumed work as a driver for Orleans Auto Parts in January of 1985, where he remained employed until he was involved in another automobile accident, discussed below.

On May 8, 1985, plaintiff was involved in an auto accident during his employment with Orleans Auto Parts. He sought treatment from Dr. Borgran, a general surgeon. Plaintiff complained of neck and knee injury with attendant headaches and neck pain. Examination revealed no objective sign of injury and plaintiff displayed a full range of neck motion.

On May 16, 1985, plaintiff sought treatment from Dr. Rauchwerk, an orthopedic surgeon, for alleged injuries stemming from the pole accident of December 10th. No objective signs of injury were found. Plaintiff did not tell the doctor of his auto accident of eight days before. Rauchwerk last examined plaintiff on September 16, 1985, discharging him "with full benefit form orthopedic treatment with no residual loss of function or stability".

Plaintiff was involved in yet another automobile accident on January 15, 1986. On this same date he returned to Dr. Bogran complaining of pain in his neck, back, knees, left shoulder and left arm and attendant headaches. Bogran found his neck to be free of pain, but for the first time detected a muscle spasm in the lower back. He diagnosed the problem as being caused by the recent automobile accident. Plaintiff was discharged from his care in July of 1986 with no limitations.

In April of 1986, plaintiff began treatment with Dr. Phillips, an orthopedic surgeon, for alleged the injuries of December 10th, 1984. Phillips was

not informed of any other accidents, either before or after the December 10th, 1984 incident. Plaintiff complained of pain in his neck and back. Mild spasm was found in the neck. Based on a diagnostically questionable procedure known as discogram, Phillips diagnosed plaintiff as suffering from a herniated nucleus pulposus, an injury to the ligament which holds the disk in place. However, Phillips also testified that it doesn't take long for a spasm to show up, usually the next day and rarely any later than two weeks. He stated that it was highly unusual that no muscle spasm was found by Konlee in his December 19, 1984 examination if indeed the injury had occurred nine days before that examination. regarding causation of plaintiff's injuries, Phillips stated that he relied on the truthfulness of the plaintiff was injured on December 10th, 1984 and that if the history given was incorrect, his diagnosis as to causation would be incorrect. On August 29th, 1986, plaintiff was seen by Dr. Laborde, Chairman of Department of Orthopedics at Touro Hospital. Plaintiff complained of pain from the telephone pole accident. upon examination, Laborde found a very muscular man,

indicative of an individual who engaged in significant physical activity. There was no muscle atrophy. He administered a CAT scan and an MRI and found no indication of a herniated cervical disk. Laborde testified that in his four and one-half years of examining the plaintiff, he never found evidence of a muscle spasm. There were no objective findings of injury. The doctor opined that the complaints were psychological in origin as there was no orthopedic explanation.

It is important to note that none of these treating physicians were ever given plaintiff's complete medical and factual history. The many treatments overlapped, yet the doctors did not know that the plaintiff had been treated elsewhere nor did they know that he had been involved in any accident other than that for which they were treating him. Plaintiff filed lawsuits in connection with three of the four above mentioned accidents, and settled another prior to suit. He does not deny that he deceived his doctors and asserts that he did so at the instruction of his former attorney.

The plaintiff in a personal injury suit must prove by a preponderance of the evidence fault,

causation, and damage. LSA-C.C., art. 2316. He must prove that the defendant was negligent and this negligence caused the plaintiff's damage. Such proof need only be by a preponderance of the evidence. Walton v. Wolfe, 406 So.2nd 169 (La. 1981); Guillory v. Avondale, 448 So.2nd 1281 (La. 1984). This court may not disturb the jury's findings of fact unless it constitutes manifest error or is clearly wrong. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact will not be disturbed upon review. Rosell v. ESCO, 549 So.2nd 840 (La. 1989). However, where objective evidence so contradicts a witness' story or the story itself is so internally inconsistent that a reasonable fact finder would not credit the witness' story, this court may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. Rosell, supra. In the instant case, even assuming that plaintiff has suffered an injury as found by Phillips, we find that the plaintiff has failed to prove causation between that injury and defendant's action.

Because plaintiff deceived his treating

physicians concerning his medical history, any diagnosis as to causation would be unreliable. In the words of Dr. Phillips, if the history were incorrect the diagnosis would be incorrect. The plaintiff asserts that the injury found by Dr. Phillips, a herniated disk, was caused by the falling telephone pole on December 10 1984. However, plaintiff has been treated on five known occasions for neck and back pain. There is nothing contained within this record, other than plaintiff's bald assertion, to show that the alleged injuries were the result of the defendant's actions. The plaintiff has admittedly been deceptive and untruthful to both his physicians and parties during the course of litigation, including testimony given under oath in this case.

It is clear from the record in this matter that the plaintiff failed to produce any evidence that his injuries were caused by the defendant's actions. Therefore, we find that the jury verdict was clearly wrong and reverse the judgment below.

REVERSED

DARRYL LEWIS AND	*	No. 91-CA-2145
FLORENCE WHITE	*	COURT OF APPEAL
VERSUS	*	FOURTH CIRCUIT
ALVIN CALICE, SOUTH CAROLINA FREIGHT, XYZ INSURANCE COMPANY, SOUTH CENTRAL BELL, AND NEW ORLEANS PUBLIC SERVICE		STATE OF LOUISIANA

* * * *

Jones, J., respectfully dissents.

The jury was not manifestly erroneous in its determination of liability and the award of damages to plaintiff.

The majority concludes that the plaintiff misled his doctor when he sought medical treatment. Therefore, the question of injury caused by the accident which is the subject of this suit was not proven by a preponderance of the evidence. This is a fact question which the jury decided in favor of the plaintiff.

The jury, as the trier of fact heard the testimony of all the physicians, either by court

appearance or deposition. The jury saw and hear plaintiff as he testified concerning the treatment he received for the four accidents in question. The jury concluded that the plaintiff suffered injuries in this accident and that the was entitled to damages. This court has effectively overruled the jury and substituted its own factual determination for that of the jury. Since I believe that the jury was not clearly wrong in its determination, I respectfully dissent.

Appendix F

Darryl Lewis and	*	NO. 91-CA-2145
Florence White,	*	COURT OF APPEAL
Plaintiffs	*	FOURTH CIRCUIT
Appellees	*	STATE OF LOUISIANA
versus	*	
Alvin Calice, South	*	FILED
Carolina Freight, XYZ	*	JUL 14 1992
Insurance Company,	*	
South Central Bell, and	*	Danielle Schott
New Orleans Public	*	CLERK OF COURT
Service	*	
Defendants	*	
Appellants	*	

* * * * * * *

ON APPEAL FROM ORLEANS PARISH CIVIL
DISTRICT COURT, DIVISION B
DISTRICT JUDGE, ROBERT KATZ
NO. 85-3807

* * * * * * * * *

APPLICATION BY PLAINTIFF-APPELLEE
FOR REHEARING

* * * * * * * * *

GAIL M. NELSON, Bar No. 09929
Counsel for Appellee/ Darryl Lewis

APPLICATION BY PLAINTIFF-APPELLEE

FOR REHEARING

NOW INTO COURT, through undersigned counsel, comes Darryl Lewis, plaintiff-appellee, who respectfully represents that the judgment of this Honorable Court rendered herein on the 30th day of June, 1992, reversing the judgment of the Orleans Civil District Court, which awarded a judgment to plaintiff, is erroneous and contrary to law and is prejudicial to the plaintiff-appellee for the following reasons:

1.

The plaintiff, Darryl Lewis, proved the negligence of the defendants/appellants and the ensuing injuries by a preponderance of the evidence with a twelve-person jury.

2.

The award of the trial court, i.e., jury trial, can be supported by the evidence and testimony of witnesses.

Plaintiff-appellee, Darryl Lewis, respectfully requests additional time to file a brief herein in connection with this application for a new hearing. Counsel for plaintiff/appellee is a sole practitioner and has been out of town for a considerable time since rendition of this Court's judgment.

WHEREFORE, the premises considered, plaintiff-appellee prays that a rehearing be granted in this appeal and that after due proceedings had the judgment rendered herein on the 30th day of June, 1992 be set aside and reversed and that there be judgment herein dismissing defendants' appeal.

Respectfully submitted:

Gail M. Nelson, Bar No. 09929
1001 Howard Ave, Ste. 2100
New Orleans, La. 70113
(504) 524-0552
Counsel for Plaintiff/Appellee
Darryl Lewis

ORDER

CONSIDERING THE foregoing application by plaintiff/appellee and being of the opinion that good cause is shown therein granting rehearing, let the above entitled and numbered cause be fixed for argument.

IT IT FURTHER ORDERED that plaintiff/appellee be granted until the _____ day of _____, 1992 to file a brief in support of the rehearing.

NEW ORLEANS, LOUISIANA, this _____ day of _____, 1992.

_____

Judge

CERTIFICATE OF SERVICE

IT IS HEREBY CERTIFIED that on the 13th day of July, 1992, a copy of the foregoing Application by Plaintiff-Appellee for Rehearing was mailed via U.S. Mail to all counsel of record, in a properly addressed envelope with first-class postage prepaid.

Gail M. Nelson

Appendix G

The Supreme Court of the State of Louisiana

DARRYL LEWIS AND
FLORENCE WHITE
VS. NO. 92-C - 2495
ALVIN CALICE, SOUTH
CAROLINA FREIGHT, XYZ
INSURANCE COMPANY, SOUTH
CENTRAL BELL AND NEW
ORLEANS PUBLIC SERVICE

- - - - - - - - - - - - - - -

IN RE: Lewis, Darryl: White, Florence: - Plaintiff(s); Applying for Writ of Certiorari and /or Review; to the Court of Appeal, Fourth Circuit, Number 91CA-2145; Parish of Orleans Civil District Court Div. "B" Number 85-3807

- - - - - - - - - - - - - - -

November 13, 1992
Denied.

PFC
WFM
JLD
JCW
HTL
LFC
PH

DARRYL LEWIS AND	*	No. 91-CA-2145
FLORENCE WHITE	*	COURT OF APPEAL
VERSUS	*	FOURTH CIRCUIT
ALVIN CALICE, SOUTH		STATE OF LOUISIANA
CAROLINA FREIGHT,		
XYZ INSURANCE COMPANY,		
SOUTH CENTRAL BELL, AND NEW		
ORLEANS PUBLIC SERVICE		

* * * * * *

APPEAL FROM CIVIL DISTRICT COURT,

FOR THE PARISH OF ORLEANS

NO. 85-3807, DIVISION "B"

HONORABLE ROBERT A. KATZ, JUDGE

* * * * * *

MOON LANDRIEU

JUDGE

* * * * * *

(Court composed of Chief Judge Patrick M. Schott, Judge Charles R. Ward, Judge Charles R. Jones, Judge Miriam G. Waltzer and Judge Moon Landrieu)

Jones, J., dissents.

GAIL M. NELSON

NEW ORLEANS, LOUISIANA

Attorney for Plaintiff/Appellee

NANCY J. MARSHALL

DEUTSCH, KERRIGAN & STILES

NEW ORLEANS, LOUISIANA

Attorney for Defendant/Appellant

Carolina Freight Carriers Corp.

LAWRENCE J. CENTOLA, JR.

ROBERT J. BURNS, JR.

HOFFMAN, SUTTERFIELD, ENSENAT & BANKSTON

NEW ORLEANS, LOUISIANA

Attorney for Defendant/Appellant

South Central Bell

REVERSED

JUN 30 1992

91CA2145.OPI

This appeal arises from an award for alleged personal injuries sustained in an accident.

On December 10, 1984 on Burdette Street in New Orleans, Louisiana, Darryl Lewis was repairing his mother's automobile when a Carolina Freight truck being driven by Alvin Calice caught a low hanging South Central Bell wire, causing the pole to which the wire was attached to fall. It is undisputed that the pole hit the automobile upon which Lewis was working.

Lewis filed suit against Calice, South Central Bell, South Carolina Freight, XYZ Insurance Company, and New Orleans Public Service for injuries allegedly sustained as a result of the accident. The case was tried by a jury which awarded plaintiff general damages in the amount of $37,000.00, past medicals of $5,000.00, future medicals of $6,000.00, past lost wages $62,000.00 and future lost wages of $25,000.00. Liability was allocated 25% Carolina Freight and 75% to South Central Bell. Carolina Freight and South Central Bell have appealed.

Immediately following the accident, plaintiff

was met by paramedic Henry Holmes at the scene of the accident. Holmes testified that he found plaintiff lying on his back on the ground, conscious and alert, complaining of back pain. Plaintiff told the paramedic that the pole hit the car while he was inside of it, but did not actually hit him. Holmes found no obvious sign of trauma. The plaintiff was transported to Ochsner Hospital. No objective signs of injury were found.

The plaintiff told Ochsner physicians that the struck his forehead on the steering wheel after the car he was in was hit by a falling telephone pole. He stated that he was thrown forward and backward and, as a result, was thrown out of the car, hitting his right shoulder, back and hand. He told the doctors that he had no prior neck or head injuries. By the time of trial, plaintiff's account of the accident had changed to allege that the pole first hit the car, then his head and left shoulder knocking him unconscious until he awoke at the hospital in a dazed state. Plaintiff's medical history is as follows.

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the left side of his neck. The record is silent as to the origin of the pain.

On December 4, 1984, just six days before the accident at issue, he was involved in an automobile accident. Two days after that accident, he sought treatment from Dr. Landry, an orthopedic surgeon, complaining of neck, shoulder and wrist pain. Landry diagnosed a strained neck and shoulder. The plaintiff again saw Landry on the 13th of December. He told the doctor that the had gone to Ochsner on the 10th because his shoulder injury from the 4th was bothering him. He had his x-rays from the 10th sent to Landry. He never mentioned the accident with the pole. Landry stated that the plaintiff's complaints were difficult to interpret because they could not be correlated with any part of his anatomy. There were no objective findings of injury.

Plaintiff was examined by Dr. Konlee on December 19,1984 for the pole accident. Konlee found no signs of spasm or any other objective sign of injury.

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4th, plaintiff sought treatment from Dr. Cracco, also an orthopedic surgeon. Plaintiff complained to Cracco of low back and neck pain due to an accident where a pole fell on his back. The doctor found no spasm, no neurological or physical abnormality and no atrophy or muscle weakness. The diagnosis was a mild cervical and lumbar strain based on subjective complaints. Cracco found that the plaintiff could resume work in three weeks. He saw the plaintiff again in April and found him to be normal.

Unbeknownst to his physicians, plaintiff had resumed work as a driver for Orleans Auto Parts in January of 1985, where he remained employed until he was involved in another automobile accident, discussed below.

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Plaintiff was involved in yet another automobile accident on January 15, 1986. On this same date he returned to Dr. Bogran complaining of pain in his neck, back, knees, left shoulder and left arm and attendant headaches. Bogran found his neck to be free of pain, but for the first time detected a muscle spasm in the lower back. He diagnosed the problem as being caused by the recent automobile accident. Plaintiff was discharged from his care in July of 1986 with no limitations.

In April of 1986, plaintiff began treatment with Dr. Phillips, an orthopedic surgeon, for alleged the injuries of December 10th, 1984. Phillips was

not informed of any other accidents, either before or after the December 10th, 1984 incident. Plaintiff complained of pain in his neck and back. Mild spasm was found in the neck. Based on a diagnostically questionable procedure known as discogram, Phillips diagnosed plaintiff as suffering from a herniated nucleus pulposus, an injury to the ligament which holds the disk in place. However, Phillips also testified that it doesn't take long for a spasm to show up, usually the next day and rarely any later than two weeks. He stated that it was highly unusual that no muscle spasm was found by Konlee in his December 19, 1984 examination if indeed the injury had occurred nine days before that examination. regarding causation of plaintiff's injuries, Phillips stated that he relied on the truthfulness of the plaintiff was injured on December 10th, 1984 and that if the history given was incorrect, his diagnosis as to causation would be incorrect. On August 29th, 1986, plaintiff was seen by Dr. Laborde, Chairman of Department of Orthopedics at Touro Hospital. Plaintiff complained of pain from the telephone pole accident. upon examination, Laborde found a very muscular man,

indicative of an individual who engaged in significant physical activity. There was no muscle atrophy. He administered a CAT scan and an MRI and found no indication of a herniated cervical disk. Laborde testified that in his four and one-half years of examining the plaintiff, he never found evidence of a muscle spasm. There were no objective findings of injury. The doctor opined that the complaints were psychological in origin as there was no orthopedic explanation.

It is important to note that none of these treating physicians were ever given plaintiff's complete medical and factual history. The many treatments overlapped, yet the doctors did not know that the plaintiff had been treated elsewhere nor did they know that he had been involved in any accident other than that for which they were treating him. Plaintiff filed lawsuits in connection with three of the four above mentioned accidents, and settled another prior to suit. He does not deny that he deceived his doctors and asserts that he did so at the instruction of his former attorney.

The plaintiff in a personal injury suit must prove by a preponderance of the evidence fault,

causation, and damage. ISA-C.C., art. 2316. He must prove that the defendant was negligent and this negligence caused the plaintiff's damage. Such proof need only be by a preponderance of the evidence. Walton v. Wolfe, 406 So.2nd 169 (La. 1981); Guillory v. Avondale, 448 So.2nd 1281 (La. 1984). This court may not disturb the jury's findings of fact unless it constitutes manifest error or is clearly wrong. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact will not be disturbed upon review. Rosell v. ESCO, 549 So.2nd 840 (La. 1989). However, where objective evidence so contradicts a witness' story or the story itself is so internally inconsistent that a reasonable fact finder would not credit the witness' story, this court may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. Rosell, supra. In the instant case, even assuming that plaintiff has suffered an injury as found by Phillips, we find that the plaintiff has failed to prove causation between that injury and defendant's action.

Because plaintiff deceived his treating

physicians concerning his medical history, any diagnosis as to causation would be unreliable. In the words of Dr. Phillips, if the history were incorrect the diagnosis would be incorrect. The plaintiff asserts that the injury found by Dr. Phillips, a herniated disk, was caused by the falling telephone pole on December 10 1984. However, plaintiff has been treated on five known occasions for neck and back pain. There is nothing contained within this record, other than plaintiff's bald assertion, to show that the alleged injuries were the result of the defendant's actions. The plaintiff has admittedly been deceptive and untruthful to both his physicians and parties during the course of litigation, including testimony given under oath in this case.

It is clear from the record in this matter that the plaintiff failed to produce any evidence that his injuries were caused by the defendant's actions. Therefore, we find that the jury verdict was clearly wrong and reverse the judgment below.

REVERSED

REHEARING REFUSED AUG 5 1992

Appendix H

AFFIDAVIT IN SUPPORT OF "NARRATIVE OF EXTRODINARY CIRCUMSTANCES"

I, Darryl Norbert Lewis being first duly sworn, testify and say that I as the petitioner in the entitled case, support my statements and entire story in the "Narrative of Extrodinary Circumstances".

I further swear that the responses which I have given in the "Narrative" section relating to what I have witnessed are true.

I understand that a false statement to anything stated in the "Narrative of Extrodinary Circumstances" for this affidavit will subject me to penalties for perjury.

/s/ Darryl N. Lewis

Subscribed and sworn to me this _____ day of _____, 1993

_____

Notary

My commission expires:

AFFIDAVIT IN SUPPORT OF "NARRATIVE OF EXTRODINARY CIRCUMSTANCES"

I, Dollinder Smith being first duly sworn, testify and say that I as a witness to the events recounted in the "Narrative of Extrodinary Circumstances" I support the statements and entire story.

I further swear that the events and responses which I have read in the "Narrative of Extrodinary Circumstances" section relating to what I have witnessed in Audubon Park are true.

I understand that a false statement to anything stated in the "Narrative of Extrodinary Circumstances" for this affidavit will subject me to penalties for perjury.

/s/ Dollinder Smith

Subscribed and sworn to me this _____ day of _____, 1993.

_____
Notary

My commission expires:

Appendix I-1

STATEMENT

CONTEMPORARY CLINIC OF ORTHOPAEDICS

& TRAUMATOLOGY

Joseph Rauchwerk, M.D.

3525 Prytania Street, Suite 620 N.O. ,LA 70115

DATE	DESCRIPTION	CHARGE	PAYMTS	CREDITS
5/16/85	IOV/x-rays	353.00	250.00	103.00
5/23/85	B to A w/ med report			
6/13/85	O. V.	30.00		133.00
8/1/85	O. V.	30.00		163.00
8/2/85	R & B to A			
8/8/85	Ck # 539		163.00	0
9/9/85	O. V.	30.00		30.00
9/13/85	B to A			
9/16/85	O. V.	30.00		60.00
9/27/85	B to A			
11/14/85	B to A			
12/2/85	Ck. #98324 Med rept	15.00	15.00	60.00
12/12/85	Credit Applied to Account		23.00	37.00

Appendix I-2

UNION NATIONAL LIFE INSURANCE

BATON ROUGE, LOUISIANA

PHYSICIAN'S
REPORT OF TOTAL
AND PERMANENT DISABILITY

Name of Insured		Age
DARRYL LEWIS		29
Sex	Race	Date of 1st Visit in Present Disability
male	black	May 16, 1985
State fully the Nature of Present Disability		
Status post cervical lumbar strain with residual mild low back spasm. Status post contusion of the lumbrosacral spine		
A- If Disability is Result of Accident, State When and How Injuries Were Sustained		
12/10/84 pole fell on patient, hitting him on head		

and back and knocked him down
B - If Result of Illness,
State Date of Beginning
N/A
Is Disability Due Solely From Accident or Injury Described?
Yes
State Degree of Disability Now Existing
none - patient still complains of pain
If Disability is "Total", for How long
5/15/85 - 9/26/85
On What Date Did Disability Become Total?
5/15/85

Signature of Medical Examiner	Date
	10/10/85

Appendix J

NOTE TO PROCESSING CENTER

FURTHER ACTION NECESSARY

DEPARTMENT OF

HEALTH AND HUMAN SERVICES

Social Security Administration

OFFICE OF HEARINGS AND APPEALS

DECISION
UPON REMAND
FROM APPEALS COUNCIL

Refer to: 433-06-0537

Darryl N. Lewis

8419 Plum Street

New Orleans, LA 70118

NOTICE OF FAVORABLE DECISION
PLEASE READ

This Decision Is Favorable To You

* Another office will process your decisionj. You will receive a notice from that office.

* Your local Social Security office or another office may ask you to give more information before you receive the notice. If so , Please answer promptly.

*. If you hear nothing about this decision for 60 days, please contact your local Social Security office.

If You Think the Decision is Wrong

* You have the right to appeal. You must file your appeal. You must file your appeal within 60 days from the date you receive this notice. (It will be presumed that you received the notice within 5 days after the date shown below, unless you show us that you did not receive it within the 5-day period.

* You (or your representative) have to ask for the appeal in writing. You may sign a form HA-502, called "Request for Review by the Appeals Council", ir write a letter.

* You may submit your appeal to your local Social Security office, a hearing office, or mail it directly to the Appeals Council, Office of Hearings and Appeals, P. O. Box 3200, Arlington, VA 22203.

The Appeals Council May Review the Decision on its Own Motion

* Within 60 days from the date shown below, the

Appeals Council may review the decision on its own motion. This could change the decision.

*. After 60-day period, the-Appeals Council may reopen and revise the decision in certain situations.

*. The Appeals Council will notify you if it decides to review the decision on its own motion or to reopen and revise the decision.

Unless you request revie or the Appeals Council reviews the decision on its own motion, you may not obtain a court review of your case (sections 205(g), 1631 (c) (3) or 1869 (b) of the Social Security Act).

This notice and the enclosed copy of decision mailed

April 22 1992

---

cc:

Name and address of Representative

Matt Greenbaum

#2 Canal Street

1200 WTC

New Orleans, LA 70130

504-523-2210

Replaces Form HA-L502-U7

NOTE TO PROCESSING CENTER

FURTHER ACTION NECESSARY

DEPARTMENT OF

HEALTH AND HUMAN SERVICES

Social Security Administration

OFFICE OF HEARINGS AND APPEALS

DECISION

UPON REMAND

FROM APPEALS COUNCIL

IN THE CASE OF	CLAIM FOR
	Period of Disability
	Disability Insurance
Darryl N. Lewis	Benefits, and Supple-
(Claimant)	mental Security Income
	433-06-0537
	(Social Security Number)

This case is before me on remand by the Appeals Council. Claimant filed applications for a period of disability, disability insurance benefits

and supplemental security income benefits on November 2, 1988, alleging disability as of December 10, 1984, because of back and neck injuries. His claims were denied through the reconsideration level. He filed a timely request for hearing. A hearing was held before Administrative Law Judge Brian Denton on October 3, 1989. On October 27, 1989, Judge Denton remanded the case back to the State Agency for completion of a Psychiatric Review Technique Form and evaluation of mental disorder which had not previously been evaluated. Claimant was again denied on remand and a supplemental hearing was held before Administrative Law Judge Lee J. Romero, Jr. on October 29, 1990. On December 28, 1990, Judge Romero issued a decision finding that claimant was not disabled by his degenerative disc disease and cervical strain, but could do a range of light work involving no overhead lifting and no stressful working conditions, such as small assembly work, cashier work and work as a telephone answerer. Claimant requested Appeals Council review of that decision. By Order dated October 18, 1991, his request was granted, with the Appeals Council

remanding the case for further proceedings, including a new decision, to specifically evaluate the severity and duration of claimant's mental impairment, acknowledge the Secretary's burden of proof, and complete a Psychiatric Review Technique Form.

A supplemental hearing was held before me on December 13, 1991, at which claimant appeared and testified, represented by Matt Greenbaum, Attorney at Law. Karen Harrison testified as a vocational expert, and Dr. Harold Conrad testified as a medical expert. At this hearing, claimant agreed to amend his alleged onset date to October 7, 1986.

The issue before me is whether or not this claimant has been "disabled" as that term is defined in Sections 216(i), 223 and 1614(a) (3) (A) of the Social Security Act and further, in accordance with the process of sequential evaluation set forth in Sections 404.1520 and 416.920 of Regulations No. 4. Considering the entire record, including the medical records and witness testimony and demeanor, I find for the reasons set forth below that claimant has been "disabled" within the meaning of the Act since October 7, 1986.

Claimant is a 45 year old male, born April 19, 1956. He has a high school education, and has completed one year of college. His past relevant work was medium, semi-skilled work as a delivery driver and machine operator and light, unskilled work as a laborer. There is no evidence of substantial gainful activity after the alleged onset date of disability. Claimant meets the disability insured status requirements of the Act through September, 1990.

Medical records from claimant's treating physician, Dr. Stuart Phillips, indicate that claimant injured his neck in an accident on December 10, 1984. Dr. Phillips has diagnosed claimant as suffering from a herniated cervical disc at C4-5, and has recommended that claimant undergo an anterior cervical discetomy and fusion (Exhibit Nos. 21 through 24, 34, 40 and 44).

The earliest evidence of record that claimant was suffering from a psychiatric or psychological impairment is from Dr. Phillips' progress note of October 7, 1986, in which he indicates that claimant saw a Dr. Laborde, who made a diagnosis of non-organic pain (Exhibit No. 21, p.6).

Consultant Psychiatrist Dr. Alvin Cohen evaluated claimant's complaints and symptoms included a depressed mood, decreased appetite, weight loss, difficulty sleeping, irritability, pessimism, anxiety and decreased activities. Dr. Cohen's diagnosis was depressive neurosis (Exhibit No. 32).

Consultant psychologist Scuddy Fontenelle, III, evaluated claimant on December 7, 1989. Following a psychological interview and testing with the Bender-Gestalt test and the Wechsler Adult Intelligence Scale-Revised, Mr. Fontenelle's diagnostic impression was low average intelligence with depression secondary to physical disability condition. In a medical assessment of claimant's ability to perform mental work-related activities, Mr. Fontenelle indicates that claimant's ability to make occupational, performance and personal-social adjustments ranges from seriously limited to entirely precluded (Exhibit No. 33).

The evidence establishes that claimant has a combination of severe impairments including a herniated cervical disc at C4-5 and depression. The medical expert, Dr. Harold Conrad, testified that

claimant's depression has equaled the requirements of Medical Listing 12.04 since first noted on October 7, 1986. Considering this evidence, I find that claimant has been "disabled" by his affective disorder since October 7, 1986.

FINDINGS

After careful consideration of the entire record, I find as follows:

1. Claimant met the disability insured status requirements of the Act on December 10, 1984, the date claimant stated he became unable to work, and continues to meet them through September, 1990.

2. Claimant has not engaged in substantial gainful activity since December 10, 1984.

3. The medical evidence establishes that claimant has severe cervical disc disease with a herniated disc at C4-5 and depression.

4. the severity of claimant's impairments equals the requirements of Section 12.04, Appendix 1, Subpart P, regulations No. 4 and has precluded him from working for at least 12 continuous months.

5. Claimant has been under "disability" as defined in the Social Security Act, since October 7, 1986.

DECISION

It is my decision of that, based on the application filed on November 2, 1988, claimant is entitled to a period of disability commencing October 7, 1986 and to disability insurance benefits under Sections 216 (i) and 223, respectively, of the Social Security Act.

It is my further decision that, based on the application for supplemental security income filed on November 2, 1988, claimant was "disabled" as defined in Section 1614 (a) (3) (A) of the Social Security Act, and disability has continued at least through the date of this decision.

The component of the Social Security Administration responsible for authorizing supplemental security income payments will advise claimant regarding the nondisability criteria for supplemental security income payments and, if eligible, the amount and months for which payment will be made.

Clement J. Kennington
Administrative Law Judge

APR 22 1992
Date

NO. 92-1359

Supreme Court, U.S.
FILED
MAR 11 1993
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

DARRYL LEWIS
PLAINTIFF-PETITIONER

VERSUS

SOUTH CAROLINA FREIGHT AND
SOUTH CENTRAL BELL
RESPONDENTS

Petition for Writ of Certiorari

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEY FOR RESPONDENT

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LIST OF PARTIES - RULE 29.1 LISTING

Carolina Freight Corporation is the parent corporation of Carolina Freight Carriers. The following are subsidiaries of Carolina Freight Corporation:

Carolina Freight Canada, Limited
Complete Leasing Concept
Cardinal Freight Carriers
Carrier Computer Services, Inc.
G. I. Trucking
Innovative Logistics, Inc.
Red Arrow Freight Lines

QUESTIONS PRESENTED

1. Whether this Court may grant an extraordinary writ where the issues presented are not novel and are not of great public import so as to warrant intervention by this Court?

2. Whether issues not raised in courts below are subject to review by this Court?

TABLE OF AUTHORITIES

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No. _____

IN THE SUPREME COURT OF THE
UNITED STATES

OCTOBER TERM, 1992

IN RE: DARRYL LEWIS AND FLORENCE WHITE
PETITIONERS

VERSUS

ALVIN CALICE, SOUTH CAROLINA FREIGHT,
XYZ INSURANCE COMPANY, SOUTH CENTRAL BELL,
AND
NEW ORLEANS PUBLIC SERVICE
RESPONDENTS

Petition for Writ of Certiorari

RESPONDENT'S BRIEF IN OPPOSITION

MAY IT PLEASE THE COURT:

Respondent, Carolina Freight Carriers, Inc. (hereinafter "Carolina Freight"), respectfully requests this Court to deny the petition for extraordinary writ asking this Court to reverse the judgment and opinion of the Louisiana Court of Appeal for the Fourth Circuit and to re-enter the trial court's judgment.

COURSE OF PROCEEDINGS BELOW

On March 6, 1985, petitioner filed suit in the Civil District Court for the Parish of Orleans against respondent, Carolina Freight, Alvin Calice, South Central Bell and New Orleans Public Service. Petitioner sought damages for injuries allegedly sustained from being hit by a falling telephone pole.

A jury trial was held on April 15-18, 1991. The jury found for the petitioner and awarded $135,800 in damages. The trial court entered judgment on the jury verdict on April 22, 1991. (Appendix A) Thereafter, Carolina Freight and South Central Bell filed suspensive appeals to the Louisiana Fourth Circuit Court of Appeal.

The Court of Appeal overturned the award, finding that petitioner failed to adduce any evidence that the injuries were caused by respondents' actions and therefore the jury verdict was clearly erroneous. (Appendix B) Petitioner, in turn, filed a request for rehearing to the Court of Appeal, which was denied.

Petitioner then filed an application for writs of certiorari and review to the Louisiana Supreme Court, which the Court denied on November 13, 1992. (Appendix C)

RESPONDENT'S STATEMENT OF THE CASE

This case arises out of an accident that allegedly occurred on December 10, 1984. Petitioner testified that while he was working on a car, a telephone pole struck the back of the car and then hit his head. The telephone pole was pulled down by the top of a Carolina Freight truck that had snagged a South Central Bell wire hanging below the required height.

According to petitioner, his body was three-quarters of the way in the car, when he heard a noise, began to move upright, and was hit by the telephone pole. As a result, petitioner complained of cervical problems and an inability to work. He was diagnosed by Dr. Stuart Phillips as having a herniated cervical disc, despite a negative CT scan and negative MRI.

Evidence adduced at trial demonstrated that petitioner had been involved in numerous accidents both before and after the telephone pole incident. He sought medical care following each accident and filed three suits seeking damages for these injuries. (See Appendix B, Court of Appeal decision, p. 7.) The Court of Appeal found that none of petitioner's treating physicians was ever given a complete medical and factual history, nor did they know that petitioner had been involved in accidents other than the one for which each treated him.

In reversing the jury verdict, the Court of Appeal concluded that there was nothing contained in the record, other than petitioner's bald assertions, to show that the alleged injuries were the result of the telephone pole incident; and that because petitioner had deceived his treating physicians by failing to tell them of his other accidents, any medical opinion ventured on causation was unreliable.

REASONS FOR DENYING WRIT

A. Petitioner is not entitled to the granting of an extraordinary writ.

This Court is empowered by 28 U.S.C. §1651 to "issue all writs necessary or appropriate in aid of the respective jurisdictions and agreeable to the usages and principles of laws." Because an extraordinary writ is an extreme remedy, this Court has stressed that it should only be invoked "in extraordinary situations." Kerr v. United States District Court, 426 U.S. 394, 402, 96 S.Ct. 2119 (1976). Only exceptional circumstances amounting to a judicial usurpation of power justify the imposition of this extraordinary remedy. DeVeers Consolidated Mines, Ltd. v. United States, 325 U.S. 212, 217, 65 S.Ct. 1130, 1133 (1945). Traditionally, federal courts have used the power "only to confine inferior courts to their lawful jurisdiction or to compel them to exercise authority when they have a duty to do so." Will

v. United States, 389 U.S. 90, 95, 88 S.Ct. 269, 273 (1976).

In determining whether to issue an extraordinary writ, this Court has focused on whether the petitioner has other "adequate means to attain the [desired] relief," and whether the petitioner has met "the burden of showing that [his] right to the writ is 'clear and indisputable.'" Kerr, 426 U.S. at 403, 96 S.Ct. at 2124. Both prerequisites must be met before the Court can consider the merits of the writ request. Kerr, 426 U.S. at 403, 96 S.Ct. at 2124.

As to the instant case, petitioner has failed to show that he has a clear and indisputable right to the issuance of a writ.

1. Petitioner's case does not present matters of great public import so as to warrant the issuance of an extraordinary writ.

The issues presented by petitioner's application are not matters of "public importance" and do not justify the issuance of an extraordinary writ. Ex Parte Republic of Peru, 318 U.S. 578, 63 S.Ct. 793 (1943). The issues presented by petitioner are not novel, but are simply those of a disappointed litigant in a personal injury lawsuit, whose lack of candor to his physicians, caused the appellate court to overturn an erroneous jury award. Further, the Court of Appeal's decision only affects the parties to this litigation and has no ramifications beyond the instant case.

Petitioner claims that the Court of Appeal cannot overturn a jury verdict based on credibility or lack thereof of a witness. However, the Court, relying on the Louisiana Supreme Court case of Rosell v. Esco, 549 So.2d 840 (La. 1989), held that where objective evidence so contradicts a witness' story, or the story itself is so internally inconsistent that a reasonable fact finder would not credit the witness's story, an appellate court may overturn a jury verdict. Clearly, the Court of Appeal was within its legal authority by reversing a jury verdict that was not

supported by the evidence. Dofflemyer v. Gilley, 384 So.2d 435 (La. 1980).

In an attempt to bolster his position, petitioner points to what he calls a "narrative of extraordinary circumstances." (Page 21 of petitioner's writ application.) In this narrative, petitioner recounts what he believes to be an improper meeting between Nancy Marshall, counsel for Carolina Freight Carrier, and Judge Schott of the appellate court. Petitioner attempts to use this alleged meeting as additional grounds for the granting of an extraordinary writ.

First, petitioner cannot, at the eleventh hour, raise the issues presented by the "narrative." Issues not presented to or considered by the state Supreme Court cannot be considered by this Court. Carter v. Kentucky, 101 S.Ct. 1112, 450 U.S. 288 (1981). Because petitioner never raised these circumstances in his writ to the Louisiana Supreme Court, this Court should not consider them.

Second, even if this Court can review this issue, the allegations are without merit. Respondent submits the affidavit of Nancy J. Marshall attesting to the fact that she was not jogging in the park on May 2, 1992 with Judge Schott. (Appendix D) Nancy J. Marshall further attests to the fact that other than appearing before Judge Schott on two occasions, when there were oral arguments in this case, she has never met him.

Petitioner's attempt to falsely inject into these proceedings "extraordinary circumstances" underscores the petitioner's desperation and the absence of grounds to support the granting of an extraordinary writ.

B. Petitioner is not entitled to the granting of a writ of certiorari.

Finally, even if this Court categorizes petitioner's application as one for a writ of certiorari, it still does not present issues that warrant the triggering of review. Supreme Court Rule 10

provides that "[a] review on writ of certiorari is not a matter of right, but of judicial discretion. A writ of certiorari will be granted only when there are special and important reasons." Sup. Ct. R. 10.

Rule 10 lists three circumstances which justify issuance of a writ of certiorari; none of which are present in the instance case. Petitioner has not alleged that "important questions of federal law" were decided nor that the Louisiana Supreme Court "decided a federal question in a way that conflicts with the decisions of other state courts of last resort or of a United States Court of Appeals." Sup. Ct. R. 10. Rather, Petitioner's application only raises issues of Louisiana state law.

It is well established that where a state court judgment rests on independent and adequate state grounds, a writ of certiorari should be denied since the Court's only power over state judgments is to correct them to the extent that they incorrectly adjudged federal rights. Zacchini v. Scripps-Howard Broadcasting Co., 97 S.Ct. 2849, 433 U.S. 562 (1977). Clearly, the circumstances presented by petitioner's application do not justify issuance of a writ of certiorari.

CONCLUSION

Because petitioner has failed to establish that he has a clear and indisputable right to the issuance of an extraordinary writ or that grounds exist for granting a writ of certiorari, respondent respectfully requests that the writ application be denied.

Respectfully submitted,

HOWARD L. MURPHY

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APPENDIX A

CIVIL DISTRICT COURT
FOR THE PARISH OF ORLEANS
STATE OF LOUISIANA

NUMBER 85-3807 DIVISION "B" DOCKET NO. 4

DARRYL LEWIS AND FLORENCE WHITE
vs
CAROLINA FREIGHT CARRIERS CORP. AND
SOUTH CENTRAL BELL

JUDGMENT

This matter came on for trial by jury on April 15, 16, 17 and 18, 1991:

Present: Gail Nelson, Esq., attorney for and Darryl Lewis;
Larry Centola, Esq., attorney for South Central Bell;
Nancy Marshall, Esq., attorney for Carolina Freight, Inc.

and the following jurors:

Valinder Addison	Wanda Bailey
Ethen A. Crawford	Stephen S. Decker
Hilda Williams	Lovie Encalade
Dolores Evans	Brenda Nunnery
Maude Parker	Patricia Scott
Pamela Smith	Marigold Taylor

After considering the pleadings, the evidence, the argument of counsel, and the law and in compliance with the jury verdicts;

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that there be judgment herein in favor of Darryl Lewis

and against Carolina Freight Carriers Corp. and South Central Bell in solido to the extent of 25% against Carolina Freight Carriers Corp. and 75% against South Central Bell as follows: general damages in the sum of $37,500.00; past medical expenses in the sum of $5,300.00; future medical expenses in the sum of $600.00; past lost wages in the sum of $62,000.00; and future lost wages in the sum of $25,000.00 all with interest from the date of judicial demand until paid and for all costs.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that defendants be case for the expert witness fees as follows: Dr. Stuart Phillips, in the sum of $500.00; Dr. Rauchwerk in the sum of $200.00; and Dr. Wolfson in the sum of $300.00.

New Orleans, Louisiana, the 22nd day of April, 1991.

_____

Robert A. Katz, Judge

APPENDIX B

DARRYL LEWIS AND	
FLORENCE WHITE	* No. 91-CA-2145
	*
	* COURT OF APPEAL
VS	
	* FOURTH CIRCUIT
ALVIN CALICE, SOUTH	*
CAROLINA	*
FREIGHT, XYZ INSURANCE	*
COMPANY,	*STATE OF LA
SOUTH CENTRAL BELL, AND	*
NEW ORLEANS PUBLIC	*
SERVICE	*

* *

APPEAL FROM CIVIL DISTRICT COURT,
FOR THE PARISH OF ORLEANS
NO. 85-3807, DIVISION "B"
HONORABLE ROBERT A. KATZ, JUDGE

MOON LANDREAU
JUDGE

(Court composed of Chief Judge Patrick M. Schott, Judge Charles R. Ward, Judge Charles R. Jones, Judge Miriam G. Waltzer and Judge Moon Landrieu) Jones, J., dissents

Gail M. Nelson
New Orleans, Louisiana
Attorney for Plaintiff/Appellee

Nancy J. Marshall
Deutsch, Kerrigan & Stiles
New Orleans, Louisiana
Attorney for Defendant/Appellant
Carolina Freight Carriers Corp.
Lawrence J. Centola, Jr.
Robert J. Burns, Jr.
Hoffman, Sutterfield, Ensenat & Bankston
New Orleans, Louisiana
Attorney for Defendant/Appellant
South Central Bell

COURT OF APPEAL, FOURTH CIRCUIT
FILED
DANIELLE SCHOTT **REVERSED**
CLERK OF COURT

This appeal arises from an award for alleged personal injuries sustained in an accident.

On December 10, 1984, on Burdette Street in New Orleans, Louisiana, Darryl Lewis was repairing his mother's automobile when a Carolina Freight truck being driven by Alvin Calice caught a low hanging South Central Bell wire, causing the pole to which the wire was attached to fall. It is undisputed that the pole hit the automobile upon which Lewis was working.

Lewis filed suit against Calice, South Central Bell, Carolina Freight, XYZ Insurance Company, and New Orleans Public Service for injuries allegedly sustained as a result of the accident. The case was tried by a jury which awarded plaintiff general damages in the amount of $37,000.00, past medicals of $5,000.00, future medicals of $6,000.00, past lost wages of $62,000.00 and future lost wages of $25,000.00. Liability was allocated 25% to Carolina Freight and 75% to South Central Bell. Carolina Freight and South Central Bell have appealed.

Immediately following the accident, plaintiff was met by paramedic Henry Holmes at the scene of the accident. Holmes testified that he found plaintiff lying on his back on the ground, conscious and alert, complaining of back pain. Plaintiff told the paramedic that the pole hit the car while he was inside it, but did not actually hit him. Holmes found no obvious sign of trauma. The plaintiff was transported to Ochsner Hospital. No objective signs of injury were found.

The plaintiff told Ochsner physicians that he struck his forehead on the steering wheel after the car was hit by a falling telephone pole. He stated that he was thrown out of the care, hitting his right shoulder, back and hand. He told the doctors that he had no prior neck or head injuries. By the time of trial, plaintiff's account of the accident had changed to allege that the pole first hit the car, then his head and left shoulder knocking him unconscious until he awoke at the hospital in a dazed state. Plaintiff's medical history is as follows.

In December of 1983, plaintiff was admitted to Ochsner Hospital for back problems and pain in the left side of his neck. The record is silent as to the origin of the pain.

On December 4, 1984, just six days before the accident at issue, he was involved in an automobile accident. Two days after that accident, he sought treatment from Dr. Landry, an orthopedic surgeon, complaining of neck, shoulder and wrist pain. Landry diagnosed a strained neck and shoulder. The plaintiff again saw Landry on the 13th of December. He told the doctor that he had gone to Ochsner on the 10th because his shoulder injury from the 4th was bothering him. He had his x-rays from the 10th sent to Landry. He never mentioned the accident with the pole. Landry stated that the plaintiff's complaints were difficult to interpret because they could not be correlated with any part of his anatomy. There were no objective findings of injury.

Plaintiff was examined by Dr. Konlee on December 19, 1984 for the pole accident. Konlee found no signs of spasm or any other objective sign of injury.

In January of 1985, while he was seeing Landry for the automobile accident of December 4th, plaintiff sought treatment from Dr. Cracco, also an orthopedic surgeon. Plaintiff complained to Cracco of low back and neck pain due to an accident where a pole fell on his back. The doctor found no spasm, no neurological or physical abnormality and no atrophy or muscle weakness. The diagnosis was a mild cervical and lumbar strain based on subjective complaints. Cracco found that the plaintiff could resume work in three weeks. He saw the plaintiff again in April and found him to be normal.

Unbeknownst to his physicians, plaintiff had resumed work as a driver for Orleans Auto Parts in January of 1985, where he remained employed until he was involved in another automobile accident, discussed below.

On May 8, 1985, plaintiff was involved in an auto accident during his employment with Orleans Auto Parts. He sought treatment from Dr. Borgran, a general surgeon. Plaintiff complained of neck and knee injury with attendant headaches and neck pain. Examination revealed no objective sign of injury and plaintiff displayed a full range of neck motion.

On May 16, 1985, plaintiff sought treatment from Dr. Rauchwerk, an orthopedic surgeon, for alleged injuries stemming from the pole accident of December 10th. No objective signs of injury were found. Plaintiff did not tell the doctor of his auto accident of eight days before. Rauchwerk last examined plaintiff on September 16, 1985, discharging him "with full benefit from orthopedic treatment with no residual loss of function or stability."

Plaintiff was involved in yet another automobile accident on January 15, 1986. On this same date he returned to Dr. Bogran complaining of pain in his neck, back, knees, left shoulder and left and attendant headaches. Bogran found his neck to be free

of pain, but for the first time detected a muscle spasm in the lower back. He diagnosed the problem as being caused by the recent automobile accident. Plaintiff was discharged from his care in July of 1986 with no limitations.

In April of 1986, plaintiff began treatment with Dr. Phillips, an orthopedic surgeon, for alleged injuries of December 10th, 1984. Phillips was not informed of any other accidents, either before or after the December 10th, 1984 incident. Plaintiff complained of pain in his neck and back. Mild spasm was found in the neck. Based on a diagnostically questionable procedure known as a discogram, Phillips diagnosed plaintiff as suffering from a herniated nucleus pulposus, an injury to the ligament which holds the disk in place. However, Phillips also testified that it doesn't take long for a spasm to show up, usually the next day and rarely any later than two weeks. He stated that it was highly unusual that no muscle spasm was found by Konlee in his December 19, 1984 examination if indeed the injury had occurred nine days before that examination. Regarding causation of plaintiff's injuries, Phillips stated that he relied on the truthfulness that the plaintiff was injured on December 10th, 1984 and that if the history given was incorrect, his diagnosis as to causation would be incorrect. On August 29th, 1986, plaintiff was seen by Dr. Laborde, Chairman of Department of Orthopedics at Touro Hospital. Plaintiff complained of pain from the telephone pole accident, upon examination, Laborde found a very muscular man, indicative of an individual who engaged in significant physical activity. There was no muscle atrophy. He administered a CAT scan and an MRI and found no indication of a herniated cervical disk. Laborde testified that in his four and one-half years of examining the plaintiff, he never found evidence of a muscle spasm. There was no objective findings of injury. The doctor opined that the complaints were psychological in origin as there was no orthopedic explanation.

It is important to note that none of these treating physicians were ever given plaintiff's complete medical and factual

history. The many treatments overlapped, yet the doctors did not know that the plaintiff had been treated elsewhere nor did they know that he had been involved in any accident other than that for which they were treating him. Plaintiff filed lawsuits in connection with three of the four above mentioned accidents, and settled another prior to suit. He does not deny that he deceived his doctors and asserts that he did so at the instruction of his former attorney.

The plaintiff in a personal injury suit must prove by a preponderance of the evidence fault, causation, and damage. LSA-C.C., art. 2316. He must prove that the defendant was negligent and this negligence caused the plaintiff's damage. Such proof need only be by a preponderance of the evidence. Walton v. Wolfe, 406 So.2nd 169 (La. 1981); Guillory v. Avondale, 448 So.2nd 1281 (La. 1984). This court may not disturb the jury's findings of fact unless it constitutes manifest error or is clearly wrong. Where there is conflict in the testimony, reasonable evaluations of credibility and reasonable inferences of fact will not be disturbed upon review. Rosell v. ESCO, 549 So.2nd 840 (La. 1989). However, where objective evidence is so internally inconsistent that a reasonable fact finder would not credit the witness' story, this court may find manifest error or clear wrongness even in a finding purportedly based upon a credibility determination. Rosell, supra. In the instant case, even assuming that plaintiff has suffered an injury as found by Phillips, we find that the plaintiff has failed to prove causation between that injury and defendant's action.

Because plaintiff deceived his treating physicians concerning his medical history, any diagnosis as to causation would be unreliable. In the words of Dr. Phillips, if the history were incorrect the diagnosis would be incorrect. The plaintiff asserts that the injury found by Dr. Phillips, a herniated disk, was caused by the falling telephone pole on December 10, 1984. However, plaintiff has been treated on five known occasions for neck and

back pain. There is nothing contained within this record, other than plaintiff's bald assertion, to show that the alleged injuries were the result of the defendant's actions. The plaintiff has admittedly been deceptive and untruthful to both his physicians and parties during the course of litigation, including testimony given under oath in this case.

It is clear from the record in this matter that the plaintiff failed to produce any evidence that his injuries were caused by the defendant's actions. Therefore, we find that the jury verdict was clearly wrong and reverse the judgment below.

REVERSED

DARRYL LEWIS AND FLORENCE WHITE	*No. 91-CA-2145
	*
	*COURT OF APPEAL
vs	*
	*FOURTH CIRCUIT
ALVIN CALICE, SOUTH CAROLINA	*
FREIGHT, XYZ INSURANCE COMPANY,	*STATE OF LA
SOUTH CENTRAL BELL, AND NEW ORLEANS PUBLIC SERVICE	*

* * * *

APPENDIX C

THE SUPREME COURT OF THE STATE OF LOUISIANA

DARRYL LEWIS AND
FLORENCE WHITE
vs. NO. 92-C-2495

ALVIN CALICE, SOUTH CAROLINA
FREIGHT, XYZ INSURANCE COMPANY,
SOUTH CENTRAL BELL AND NEW
ORLEANS PUBLIC SERVICE

IN RE: Lewis, Darryl: White, Florence: - Plaintiff(s); Applying for Writ of Certiorari and/or Review; to the Court of Appeal, Fourth Circuit, Number 91CA-2145; Parish of Orleans Civil-District Court Div. "B" Number 85-3807

November 13, 1992.

PFC

DENIED

WFM
JLD
JCW
HTL
LFC
PH

APPENDIX D

AFFIDAVIT

STATE OF LOUISIANA
PARISH OF ORLEANS

BEFORE ME, the undersigned notary, personally came and appeared Nancy J. Marshall, who, being deposed stated that:

1. She is the attorney of record for Carolina Freight Carriers in the matter entitled "Darryl Lewis, et al. versus Alvin Calice, Southern Carolina Freight, et al." which is currently before the United States Supreme Court on an application for extraordinary writ.

2. She was trial counsel for Carolina Freight Carriers, as well as counsel during the appellate process of the Louisiana Appellate Courts.

3. In May of 1992, after the initial May 8 hearing before a three judge panel of the Court of Appeal, she was walking in Audubon Park with her husband, Stephen Rosencrans. Upon seeing Mr. Lewis, she pointed him out to her husband as being a plaintiff involved in a case that had been ongoing for seven years, and began laughing about the fact that he had allegedly had a herniated disc and yet was able to chin himself on the exercise bars in Audubon Park.

4. While discussing this matter with her husband, Mr. Lewis looked up and she said "Hello, Darryl" to him.

5. She has never met Judge Scott prior to the hearing of this case in the appellate court, and at no time discussed this case with him prior to the appellate court's decision in August 5, 1992.

_____

NANCY J. MARSHALL

Sworn to and subscribed
before me this 8th day of
March, 1993.

[s]_____
NOTARY PUBLIC